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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/685,014	10/14/2003	Jeffrey S. Brooks	BSS 6423.1	4317

321 7590 10/04/2005

SENNIGER POWERS LEAVITT AND ROEDEL
ONE METROPOLITAN SQUARE
16TH FLOOR
ST LOUIS, MO 63102

EXAMINER	
STASHICK, ANTHONY D	
ART UNIT	**PAPER NUMBER**
3728	

DATE MAILED: 10/04/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

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Office Action Summary	**Application No.** 10/685,014	**Applicant(s)** BROOKS, JEFFREY S.
	Examiner Anthony Stashick	**Art Unit** 3728

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *08 July 2005*.

2a)☒ This action is **FINAL**. 2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-26* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1-26* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☒ The drawing(s) filed on *14 October 2003* is/are: a)☒ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☐ Notice of References Cited (PTO-892)

2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)

3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____.

4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ .

5) ☐ Notice of Informal Patent Application (PTO-152)

6) ☐ Other: _____.

DETAILED ACTION

Claim Rejections - 35 USC § 102

1. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

> A person shall be entitled to a patent unless –(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

2. Claims 1-3, 6-9, 11-19 and 21-24 are rejected under 35 U.S.C. 102(b) as being anticipated by Kuznetz 4,813,160. Kuznetz '160 discloses all the limitations of the claims including the following: a generally horizontal sole 11 having heel, arch and forefoot sections (see Figures 1 and 2); air flow pumps 17 disposed in the arch and forefoot sections (see Figures 1 and 2); each air flow pump 17 comprising a generally horizontal tubular pump element defining an interior volume and having opposite ends 17l, 17T open to ambient air; hole $17P_1$, $17P_2$ located in the pump element providing fluid communication between the interior volume and a surface of the footwear adjacent a foot in the footwear (see Figures 1, 2 and 6); each pump element being resiliently compressible in a generally vertical direction upon impact of the footwear during walking or running and expansible upon liftoff during walking or running (see col. 4, lines 1-55); the resilient compression and expansion causing ambient air to flow through the holes in the pump elements to cool the foot (see col. 4, lines 1-55); the at least one air flow pump 17 having a plurality of tubular pump elements (multiples shown in Figures 1-2) having ends open to ambient air; the plurality of pump elements extend generally transverse of the footwear from the medial side of the sole to the lateral side of the sole (see Figure 2); the sole comprises an outer sole 11 and a midsole 12; the midsole 12 having at least one recess defined

therein (See Figure 6); at least one air flow pump is located in the recess (see Figure 6 where 17 is located); the midsole has a plurality of holes (where 17L and 17T pass through in Figures 1-2 and 6) in the medial side and in the lateral side thereof; the holes being in registration with the open ends of the pump elements for communication of the pump elements with ambient air (see Figures 2 and 6); the holes in the midsole have decorative shape (circle); the sole further comprises a liner 15; the liner having a plurality of openings therein 19_1, 19_2; the openings of the liner are in communication with the holes in the pump elements such that air can pass out of the holes and through the openings in the liner (see Figure 6); the pump elements are circular in transverse cross-section (see Figures 1, 2 and 6); the pump elements have enlarged portions (cuts at 17L and17T) to increase the size of the open ends; the sole has heel, arch and forefoot sections with the air flow pumps being disposed in each section (see Figure 2); an insole 15; the air flow pump located between the insole and outer sole in a recess (recess in the midsole); the pumps being formed as a unit received in the recess (see Figures 2 and 6); the plurality of pump elements defining an interior volume separate from the recess and separate from the interior volume defined by another pump elements (See Figures 1, 2 and 6, each pump element is located in a separate recess in the midsole). With respect to claims 21 and 23, since these are product-by-process claims and a similar product has been found, the way in which the pump elements are formed is a method step that is not necessary to be found since applicant has not claimed the method of making the pump elements. With respect to claim 22, the midsole between the pump elements is considered the substrate connecting the pump elements. With respect to claim 24, the compression and release of the pump elements of Kuznetz'160 meet the limitations of this claim as noted above.

Claim Rejections - 35 USC § 103

3. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

4. Claim 4 is rejected under 35 U.S.C. 103(a) as being unpatentable over Kuznetz 4,813,160 as applied above in view of Moretti 6,655,048. Kuznetz '160 as applied above discloses all the limitations substantially as claimed except for the ends of the pump elements being covered with a barrier pervious to the flow of air but impervious to the flow of water. Moretti '048 teaches that holes in the sides of a sole can be covered with an impermeable material 19 which allows for the flow of vapor out of the sole but prohibits the flow of liquid into the sole, thereby waterproofing the sole and protecting the user's feet from dampness. Therefore, it would have been obvious, to one of ordinary skill in the art at the time the invention was made, to place an impermeable layer, such as that taught by Moretti '048, over the open ends of the pump elements of Kuznetz '160 to prevent fluid from entering the shoe sole while still allowing the sole to breathe, as taught by Moretti '048.

5. Claims 5 and 20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Kuznetz 4,813,160 as applied above in view of Sakutori 4,445,284. Kuznetz '160 as applied above discloses all the limitations substantially as claimed except for the valve located at the open ends of the pump elements. Sakutori '284teaches that it is desirable to place valves 20 in the ends of the tubes to control the flow of air in the direction desired. Therefore, it would have been obvious, to one of ordinary skill in the art at the time the invention was made, to place a valve,

such as that taught by Sakutori '284, at the open ends of the pump elements of Kuznetz '160 to allow for the user to control the rate of flow of the air within the sole and to prevent backflow of expelled air back into the sole.

6.. Claim 10 and 25-26 are rejected under 35 U.S.C. 103(a) as being unpatentable over Kuznetz 4,813,106 as applied above. Kuznetz '160 discloses all the limitations of the claim except for the pump elements being accordion-shaped in transverse cross-section. Once the pump elements of Kuznetz '160 are compressed, they can be considered to be accordion-shaped, as they will buckle in the center and then return to their original position after the pressure on them is released. Therefore, it would have been obvious, to one of ordinary skill in the art at the time the invention was made, to make the pump elements of any shape, which would help in performing the pumping function, including accordion-shaped.

Response to Arguments

7. Applicant's arguments filed July 8, 2005 have been fully considered but they are not persuasive. Applicant argues that there is no disclosure that the tubes compress or expand to introduce air into the shoe, and there is no suggestion of such an embodiment. The tubes 17 of Kuznetz are made of flexible, synthetic plastic tubes. Therefore, since these tubes are flexible, they inherently compress upon application of pressure and release air out their openings as well as draw air into their openings when the pressure is released from the tube. With respect to applicant's arguments about the accordion-shaped tubes in cross-section, it appears applicant is arguing more than that which is claimed. Applicant has only claimed that the tubes are accordion-shaped in cross section but does not state in what condition at the time of making the cross-section, i.e. in compression or without pressure applied. Therefore, the references meet

this limitation as claimed and noted in the rejections above. With respect to eh unit issue applicant argues with respect to claim 14, since the tubes of Kuznetz are located in a midsole and the midsole is the connection between the pump tubes, they can be considered to be a unit. With respect to the use of the terms "formed as a unit" in the claims, since applicant is not claiming the method of forming the tube elements, finding how they are formed is not necessary to meet the limitations of the claims.

Conclusion

8. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Anthony Stashick whose telephone number is 571-272-4561. The examiner can normally be reached on Monday-Thursday 8:30 am to 4:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Mickey Yu can be reached on 571-272-4562. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Anthony Stashick
Primary Examiner
Art Unit 3728

ADS